IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

HAROLD P. ROGERS
GEORGE A. GREENFIELD, JR.
ROBERT E. LATIMER, JR.
CLYDE R. SILER, and
LEONARD A. DINGER,

Petitioners,

versus

MELVIN E. LAIRD,
Secretary of Defense,
PAUL R. IGNATIUS,
Secretary of the Navy,
and
THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit entered in these proceedings on May 19, 1971.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit affirming a judgment entered in favor of the respondents in the United States District Court for the Eastern District of Virginia, at Norfolk, is embodied in a per curiam opinion which has not been reported. The opinion appears in the Appendix, *infra*, along with the written opinion entered by the District Court which is reported at 319 F. Supp. 1 (1970).

JURISDICTION

The decision of the United States Court of Appeals was entered on May 19, 1971. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254 (1). The time for filing the petition will expire on August 17, 1971.

QUESTION PRESENTED

Whether the respondents have acted arbitrarily and beyond the scope of their authority under the provisions of 5 U.S.C. §5343, effective September 6, 1966, and 10 U.S.C. §7474, prior to that date, in the establishment for the petitioners of wage rates substantially lower than received by employees with comparable jobs and skills who work in private industry in the geographical area of petitioners' employment as blue-collar supervisors at the Norfolk Naval Shipyard.

STATUTES INVOLVED

Title 5, United States Code Section 5343 in relevant part:

> "(a) The pay of employees excepted from chapter 51 of this title by section 5102 (c) (7) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. Subject to section

213 (f) of title 29, the rates may not be less than the appropriate rates provided for by section 206 (a) (1) of title 29."

Title 10, United States Code Section 7474 (repealed by 5 U.S.C. §5343):

"The Secretary of the Navy shall establish rates of wages for employees of each naval activity where the rates are not established by other provisions of law to conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity."

STATEMENT OF THE CASE

A. Proceedings

The petitioners are blue-collar supervisors employed by the United States of America, Department of Defense, at the Norfolk Naval Shipyard, Portsmouth, Virginia. The present action is a class action brought by the petitioners on their own behalf and on behalf of the members of the National Association of Supervisors, Chapter 3, which represents blue-collar supervisors at the shipyard.

The petitioners' wages were regulated by the provisions of Title 10, Section 7474 of the United States Code prior to September 6, 1966. Since that date, petitioners' wages have been regulated by Title 5, Sections 5341 and 5343 of the United States Code. These sections have required and continue to require that wages of Navy blue-collar employees be established to conform as nearly as is consistent with the public interest to wages paid in private industries in the immediate vicinity. Petitioners brought this class action on behalf of themselves and all members of the National Association of Supervisors, Chapter 3, seeking monetary and injunctive relief, contending that the provisions of the statutes under which wage rates are required to be established have not been complied with.

After a trial on June 1, 1970, at which time evidence was taken, and after submission of post trial briefs, the District Court in an opinion entered on September 14, 1970, dismissed petitioners' action. In its opinion the District Court held that the petitioners failed to show that the "defendants did not review and/or compile the wages of persons doing substantially the same work and with similar responsibilities of plaintiffs, or that the defendants set an arbitrary differential in determining the pay of plaintiffs over the tradesmen they supervise." Opinion and Order entered September 14, 1970, p. 12-13. The District Court's Opinion and Order is reproduced in the Appendix.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court in an opinion entered on May 19, 1971.

B. Facts

The Department of the Navy in attempting to comply with the law initiates "wage surveys" in the vicinity of the Norfolk Naval Shipyard pursuant to regulations and procedures formulated by the Navy for that purpose. The Navy, however, has not collected wage data from Newport News Shipbuilding and Drydock Company (henceforth Newport News) pertaining to supervisory pay, or from any other employer of supervisors engaged in work comparable to the work of the plaintiffs. Government's Answer to Plaintiffs' Interrogatory No. 10, Transcript 49.

In response to Plaintiffs' Interrogatory No. 11, which inquired into the reason why data for supervisor's pay in private industry was not collected, defendants answered:

> "11. The Navy does not collect wage rate information on supervisory jobs during regular wage surveys because rates of pay for supervisors are not set by a direct comparison method."

In fact, the pay of supervisors is determined by applying a percentage differential to the wage of the mechanic he supervises. The mechanics' wages are set pursuant to wage surveys in the immediate area, however, since the mechanics' pay varies according to each specialty, the pay of all supervisors is not the same. In addition, the petitioners' pay is substantially lower than supervisors receive at Newport News where petitioners' evidence indicated the work of supervisors was comparable to that of supervisors at the Norfolk Naval Shipyard.

The government's explanation for the use of the percentage differential keyed to mechanics' wages in setting supervisors' wages rather than making an independent survey was basically that (a) since mechanics' wages were set pursuant to survey of comparable wages paid in private industry, it was justifiable to set supervisors' wages by a percentage differential, in the public interest, notwithstanding discrepancies in actual wages received by comparable supervisors in private industry. Testimony of William Gerow, Transcript 163-164; (b) it was difficult to secure information on supervisory wages because private industry was "reluctant" to divulge supervisory wage data as opposed to non-supervisory wage data, Transcript 144; (c) defendants had pledged confidentially to Newport News with regard to any information given in a wage survey, Plaintiffs' Exhibit 51.

Petitioners established through the testimony of John J. Gaughan, a 29 year employee at Newport News Shipbuilding and Drydock Company as employment manager and currently as Manager of Personnel Services, that supervisors at the Norfolk Naval Shipyard were comparable in their duties to supervisors employed at Newport News. Mr. Gaughan studied and compared the job descriptions put out by the United States Government for the petitioners (Plaintiffs' Exhibit 53) with the job descriptions of the Newport News supervisors. Based on his knowledge and experience, he testified that there

was a "very strong similarity" between the jobs in question. Transcript 93. Again, at page 95 of the transcript, he described the jobs: "I think they are comparable."

The government did not undertake to deny the similarity of job duties and responsibilities and, in fact, introduced no contradictory evidence.

There is no question that Newport News Shipbuilding is in the relevant wage area involved in this case. A wage area is defined by the government to be "that geographic area surrounding a group of naval activities within which employees could change employers without changing their places of residence." Testimony of William Gerow, Transcript 141. From each wage area wage surveys are taken. In the Tidewater, Virginia, area, Newport News Shipbuilding is the largest private employer and has "a very, very substantial effect on the wage rates for this Hampton-Tidewater area." Transcript 141.

After establishing comparability in job duties and responsibilities, petitioners proved a substantial difference in the wages they have received since 1952 and the wages that their counterparts have received for comparable work in private industry. Plaintiffs' Exhibit 52 set out wages paid for Newport News supervisors in representative years 1952, 1958 and 1966. Further, this information was delineated and divided into wages for supervisors with one year, five years and ten years experience.

Plaintiff's Exhibit 54 sets out comparable pay records for Norfolk Naval Shipyard supervisor employees from 1952 to 1958. This exhibit is explained and described at page 51 of the transcript as indicating the hourly rates of pay paid to foremen of various trades which are designated underneath the trades that they supervise in a three-step system.

The comparison between the respective pay records clearly indicates that the substantial difference in wages paid

the Naval employees as compared to their civilian counterparts amounted in some instances to approximately $ .80 per hour. The fact of incomparable wages is not denied by defendants.

REASONS FOR GRANTING THE WRIT

The decision below upholds a method of establishing wages of blue-collar supervisors which petitioners contend conflicts with the intent of Congress that wages of civilian employees be established as nearly comparable as is consistent with public policy with prevailing wages in the area where the employees work.

This case affects a large number of government employees and attacks as arbitrary and illegal the establishment of a percentage differential method of setting supervisors' wages geared to the wages of the supervised mechanics without a direct relationship to wages received by comparable privately employed supervisory employees in the area.

We submit that the decision below is in conflict with the decision of another court of appeals and is inconsistent with the Congressional intent behind the relevant statutes as expressly declared by Congress and as recognized by this Court.

I. Statutory Guidelines and Policy Considerations.

Petitioners below challenged the method chosen by the Secretary of the Navy for carrying out his responsibilities under 5 U.S.C. §5341, to set Navy blue collar supervisory employees' wages "as nearly as is consistent with the public interest in accordance with prevailing rates." Instead of making surveys of privately employed supervisors' wages, the Navy surveyed the wages of the men supervised and then used a percentage differential to set their supervisors' wages.

Although the government contended below that its reasons for using the percentage differential were justifiable

on public policy grounds, the petitioners' evidence showed that there was in fact a substantial disparity between the supervisors at the Norfolk Naval Shipyard and comparable private supervisors in the area. The petitioners contend that the government's method is arbitrary and inconsistent with the policy of the statute.

The underlying congressional intent, which we submit must be considered in construing the statutes and in judging the actions of the respondents, is plainly established in 5 U.S.C. §5301, as follows:

> "It is the policy of Congress that Federal pay fixing be based on the principles that
>
> (1) There be equal pay for substantially equal work, and pay distinctions be maintained in keeping with work and performance distinctions; and
>
> (2) Federal pay rates be comparable with private enterprise pay rates for the same levels of work."

This legislation is consistent with prior legislation establishing a federal policy of maintaining competitive salaries. This Court in *Amell v. United States*, 384 U.S. 158, 161, n. 7 (1966), a case involving the jurisdiction of the Court of Claims to hear actions for wages brought by certain government employees, recognized the trend in government employment to pay salaries comparable to private industry:

> "In 1962, Congress enacted the Federal Salary Reform Act, making an explicit declaration of policy that federal salary fixing should be comparable to private enterprise salary rates for the same levels of work, Act of October 11, 1962, Pub 1 87-793, 76 Stat 814, 5 U.S.C. §§1171-1174 (1964 ed.). Pursuant to congressional direction the President issued an Executive Order, Exec. Order

> No. 11173, Aug. 20, 1964, 29 Fed. Reg. 11999, taking full cognizance of the congressional policy enunciated in the Federal Salary Reform Act of 1962 . . . Thus, the whole trend in government compensation is to draw individuals into public service by providing salaries at least comparable to those they would earn on entering private industry."

There can be no question that the congressional interest in providing for comparable wages was to enable the Federal Government to be competitive in the job market surrounding wage areas such as the Tidewater, Virginia, area.

While the District Court in its Opinion stated that the petitioners' complaint that the pay of Navy supervisors was not in keeping with that of the Newport News "Ship" was not supported by the record, petitioners submit that this is an incorrect conclusion from a reading of the whole record and from petitioners' evidence to the contrary. Further, petitioners desire to bring before this Court the question of whether the use of a "percentage differential" method without considering what comparable supervisors actually earn is improper under the statute.

II. Conflict with Court of Claims.

Although the District Court below relied heavily on *Daniels v. United States*, 407 F. 2d 1345 (Ct. Cl. 1969), petitioners believe that the principles set forth in *Daniels* are inconsistent with the court of appeals' decision below. The *Daniels* case was an action brought by Navy employees alleging that the Navy had acted arbitrarily in fixing their salary rates as ships' pilots by applying a percentage differential of seventy percent to the base pay for a 40-hour week of a Class A Ships Master in the Military Sea Transporation Service rather than basing their wages on the rates of pay of non-government pilots in the same area. There, the statutes in question governing the establishment of Navy pilots' pay was significantly different from the statute at bar. In *Daniels*,

the applicable statutes provided for pay comparable not with local wage rates, but with *"nationally prevailing rates and practices in the maritime industry"* [Emphasis supplied]. 5 U.S.C. §5342.

In the *Daniels* case, the factual situation materially differed from the case at bar. There, the Navy had performed a detailed investigation of ship pilots' salaries in the private sector. That investigation yeilded an authoritative report which was introduced into evidence. The Court of Claims placed heavy reliance on the recommendations in the Navy's report which concluded that a uniform national salary rate should be established for pilots. Further, in support of the Navy's determination to set the pilots' wages by a uniform percentage differential method the Court of Claims pointed out that in the report, *supra,* at 11347,

> "It was found that no adequate salary formula could be established upon a classification of the relative functions, experience, and qualifications of the pilots, since most pilots performed or were qualified to perform the same duties to a greater or less degree. *In addition, the report determined that Navy pilots had no exact counterparts in the maritime industry."* (Citations omitted; emphasis supplied)

In petitioners' case, there is no contention by the government that a uniform national salary rate should be established for supervisors. Rather, the terms of the applicable statutes indicate that the supervisors' wages are to be set competitively in each wage area. Further, the Navy does not conduct wage surveys of supervisors in the immediate area. This supports the contention that the supervisors' wages are necessarily arbitrary. Confronted with a similar contention in *Daniels,* that the pilots' pay was arbitrary because it was geared to the pay of a Ship's Master, the Court of Claims said, at 407 F. 2d 13:

"Plaintiffs further contend, however, that the use of the pay of a Class A Ship's Master, MSTS, as a salary base for Navy pilots is arbitrary because of the noncomparability of the duties of masters and pilots. The report tacitly admits that the two jobs are not comparable, but further states that – in the absence of any comparable base – it was necessary to select some position within the maritime industry upon which to found the salary rate. This conclusion was reached, however, only after a careful consideration and rejection of the various pilot salaries that could be used as a base (Project 30-36). *The important point, moreover, is that the amounts paid to non-Navy pilots in accordance with prevailing industry rates were calculated without reference to the position of Ship's Master. It was only after the pilots' salary range was determined in light of industry practice that the search for a base settled upon the master's position. It is therefore seen that the pay of Navy pilots was related directly to the salaries paid other pilots,* and the use of the master's position as a base was merely a matter of administrative and mathematical convenience." [Emphasis supplied]

It is the lack of a direct relationship between Navy supervisors' wages and the wages of privately employed supervisors, their counterparts, that is the basis for petitioners' claim that the method of establishing their pay arbitrary and contrary to the statute. Petitioners established the comparability between Naval Shipyard supervisors and those employed at Newport News Shipbuilding. The disparity in pay is unquestioned. There is no Navy report here, as in *Daniels,* which surveyed the applicable wage area and made a finding on the issues of comparability or level of wages. The distinctions pointed out in *Daniels* between Navy pilots and private pilots, at 407 F. 2d 1348, are not applicable here, Navy supervisors and supervisors at Newport News have the same duties and responsibilities, and more importantly, compete in the same regional employment market.

Petitioners further contend that the justifications given by the respondents for employing a percentage differential are inadequate in light of the evidence. They are charged by Congress with the responsibility of establishing comparable wages for plaintiffs. It is true that they are necessarily given discretion in accomplishing that goal. But the methods they choose to carry out the congressional mandate must be reasonably calculated to achieve that goal. The wage rates determined for supervisors must by law be comparable to wages paid for supervisors in private industry, consistent, of course, with the public interest. Under "public interest," however, the agency charged with setting rates cannot merely opt for a convenient device for setting those wages, the percentage differential geared to the mechanics' wages, where that device has no relationship to the goal of achieving comparable pay for a large class of government employees.

III. Employees Affected

Certiorari should be granted for the additional reason that vast numbers of government employees are affected. The percentage differential has been adopted throughout the government as a part of the Coordinated Federal Wage System, so that all blue-collar supervisors are now paid on this basis. The government may arbitrarily establish the percentage differential for various positions, and, rather than being paid comparably to private positions, supervisors' pay must be geared to the pay of the men they supervise. Petitioners believe that this issue is of great importance.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
HAROLD P. ROGERS, et al
By/s/ Stanley E. Sacks
Stanley E. Sacks

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 15,312

Harold P. Rogers, et al.

Appellants,

v.

Melvin M. Laird, Secretary of Defense, Paul R. Ignatius, Secretary of the Navy, and the United States of America,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

(Argued May 4, 1971 Decided May 19, 1971.)

Before Bryan, Butzner and Russell, Circuit Judges.

Stanley E. Sacks (Filmore E. Rose and Sacks, Sacks and Tavss on brief) for Appellants, and William D. Appler, Attorney, Department of Justice, (L. Patrick Gray, III, Assistant Attorney General, Alan S. Rosenthal, Attorney, Department of Justice, and Brian P. Gettings, United States Attorney, on brief) for Appellees.

PER CURIAM:

As blue-collar supervisors employed by the Government at the Norfolk Naval Shipyard, Harold P. Rogers and others commenced an action in the Federal District Court for Eastern Virginia on behalf of themselves and all other members of the National Association of Supervisors, Chapter 3, a labor organization, asserting that the laws under which wage rates are fixed for Navy blue-collar supervisors have not been followed. 10 USC 7474, as amended 5 USC 5341. Named as defendants are the Secretary of Defense, the Secretary of the Navy and the United States. Plaintiffs seek recovery of unpaid compensation and injunctive relief for protection in the future.

After a trial, the action was dismissed. We affirm on the opinion of the District Judge, 319 FS 1 (1970).

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

HAROLD P. ROGERS, et als, Plaintiffs,	)	CIVIL ACTION NO. 6440
v.	)	
MELVIN E. LAIRD, Secretary of Defense, etc., et als, Defendants.	)	

OPINION AND ORDER

Plaintiffs are blue-collar supervisors employed by the United States at the Norfolk Naval Shipyard (Shipyard). They instituted this class action on behalf of themselves and all members of the National Association of Supervisors, Chapter 3, seeking money and injunctive relief. They contend that the provisions of the statutes under which wage rates are established for Navy blue-collar employees have not been complied with.

The interpretation and application of the statutes is the question. Title 10 § 7474 U.S.C.A., effective prior to September 1966, provided:

> The Secretary of the Navy shall establish rates of wages for employees of each naval activity where the rates are not established by other provisions of law to conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity.

The pertinent part of Title 5 § 5341, effective since September 1966, provides:

> (a) The pay of employees excepted from Chapter 51 of this title by section 5102(c) (7) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. Subject to section 213 (f) of title 29, the rates may not be less than the appropriate rates provided for by section 206 (a) (1) of title 29.

To comply with the statutes, the Navy initiated "wage surveys" under regulations and procedures formulated by it. Plaintiffs say the surveys were improper in that they did not (a) review or compile the wages of persons doing substantially the same work or having the same responsibilities as plaintiffs; (b) the surveys were not taken in similar industries;[1/] and (c) the Navy set an arbitrary differential in determining the pay of plaintiffs over the tradesmen they supervise. Plaintiffs further complain that supervisory personnel was not utilized in making the wage survey.

The fixing of a supervisory pay schedule was a source of difficulty with the Navy. It had for many years been based on a "cents-per-hour" differential, which decreased in percentage as the mechanic's hourly rate increased. After a rather exhaustive study of the Navy's prior practices, studies made of private industry, and surveys then conducted by the Navy, it was determined that the fair and proper system to be used was a self adjusting type system. Under such a system it would not be necessary to continually "change the differentials." These studies led to the determination that the "first level of supervisory differential should by 25 per cent," and then it "built the rest of the structure on that." Such a plan was adopted about 1952. The National Association of

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1. Plaintiffs say the only similar industry in the area of the Norfolk Naval Shipyard is Newport News Shipbuilding and Dry Dock Corporation.

Supervisors was consulted about the plan, and were generally "favorable disposed toward it." The self adjusting feature "was a great improvement over the straight cents-per-hour system." In the study in 1952 and subsequent thereto, the Navy has found it most difficult to obtain pay rate information of comparable supervisory jobs. The tables of organization of the Navy and private industry were and are quite different. Hence the Navy took it differential established for the first level and built upon that. The validity of the percentages differential is checked periodically and altered or changed following surveys and studies. Since the supervisor's pay is based on a percentage of pay of the persons he supervisers, the pay of all supervisor's is not the same. That is, a supervisor of machinists makes more than a supervisor of laborers. His training, knowledge, experience and work is quite different, and while his percentage of differential is the same, the pay is different because a machinist earns more than a laborer.

The classification of employees at the Navy Yard is rather detailed. For instance, within the supervisory levels there are three step ranges, and in the ranking of trades for mechanics there is a level system extending from 1 to 15 based on skill and responsibility.

Mechanics' wages are set by local wage surveys in each area in which the Navy has employee population. In collecting wage information, surveys are made of (a) "major competitors for that classification of people," and (b) "jobs in which there is a heavy representation in private industry." In such surveys, selections are made of 25 to 35 jobs which are "representative of a community's wage structure," and of companies that are essentially the same kind of industry as the Navy. A full scale survey is conducted every three years, and a wage-change survey conducted every year between. Such surveys have resulted in an annual increase in wages for the past twenty-five years. Such plan is Navy-wide throughout the United States, affecting some 200,000 blue-collar workers. The plan used by the Navy is used by others. In the Tidewater

Area it is used by the Shipyard, Naval Air Rework Facility, Naval Station, Naval Amphibious Base, Naval Ammunition Facility at Yorktown, St. Julien's Creek, Naval Supply Center, Public Works Center, Naval Hospital, and all the activities in the area. It is necessary to prevent competition between activities. A differential in mechinists' pay at the Shipyard and at the Air Rework Facility would bring about difficulty. In all probability the machinist would want to transfer to the facility with the highest pay, depriving the lower pay facility of its needed employees.

While wage surveys were successful in getting information on non-supervisory rates, because they were often the subject of collective bargaining agreements, difficulty was experienced in obtaining information on supervisory rates. In fact the Navy has had little success in obtaining this information from Newport News Shipbuilding and Dry Dock Corporation (Newport News Ship), the largest private shipbuilder in the Tidewater Area.

The expert witness, Dr. Gordon, who testified for plaintiff, says that fixing pay of supervisory personnel at a percentage above the pay of the people he supervises is used in industry, but he says it is not the best practice. Mr. Gerow, the expert for defendant, says such a system is widely used in industry, and is an accepted practice. Mr. Gerow's experience, training and knowledge are extensive. His reasoning was sound. I prefer to accept his opinion on the issue.

A classification of positions, responsibilities, and number of persons supervised by the Shipyard is attached as Appendix "A", and a similar chart for the Newport News Ship is attached as Appendix "B". From these it will be seen that the table of organization for each facility is quite different. An attempted comparison is difficult, and would be of little help.

The wage rates for supervisors are no longer set by the Navy. The Civil Service Commission now has general authority for establishing guidelines and procedure to be used in

wage fixing under the Coordinated Federal Wage System. The purpose is to establish a single wage system for ungraded employees of the government. The plan has been given great study over a long period. The coordinated pay system will use a percentage differential system in paying Navy blue-collar supervisors.

In each of the statutes here under consideration the pay of employees is to be fixed and adjusted, from time to time, "as nearly as is consistent with the public interest," to conform "with those of private establishments in the immediate vicinity" prior to 1966, and since September 1966 "in accordance with prevailing rates." Of primary concern in each of the statutes was "the public interest." Congress has delegated to the Executive Branch great discretion in fixing the wages of its employees. Any review by the Court of actions taken by the Executive Branch is and should be very limited. Under no circumstances should the Court undertake to substitute its judgment. The right of review by the Court is limited to whether the Navy has (a) exceeded its authority, or (b) its action is clearly wrong.

The Supreme Court said in *United States v. Shimer*, 367 U.S. 374, at 381:

> ... More than a half-century ago this Court declared that "where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong." *Bates & Guild Co. v. Payne*, 194 U.S. 106, 108-109. This admonition has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the

statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See e.g., *National Broadcasting Co. v. United States,* 319 U.S. 190; *Labor Board v. Hearst Publications, Inc.,* 332 U.S. 111; *Republic Aviation Corp. v. Labor Board,* 324 U.S. 793; *Securities & Exchange Comm'n v. Chenery Corp.,* 332 U.S. 194; *Labor Board v. Seven-Up Bottling Co.,* 344 U.S. 344.

And again in *Udall v. Tallman,* 380 U.S. 1, at page 16:

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment *Comm'n v. Aragon,* 329 U.S. 143, 153. See also, e.g., *Gray v. Powell,* 314 U.S. 402; *Universal Battery Co. v. United States,* 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake "involved a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Power Reactor Co. v. Electricians,* 367 U.S. 396, 408. When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order

"Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the

> regulation if the meaning of the words used is in doubt . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414.

In *Daniels v. United States*, 407 F.2d 1345, (Ct. Claims 1969), after quoting the above language from *United States v. Shimer*, supra, the Court said:

> It should be clear from the cited authorities that this court will not purport to tell the Secretary of the Navy what salary formula and base he should adopt. Our concern is simply to determine whether plaintiffs have met their heavy burden of proving that the Secretary's action in this instance was so arbitrary as to be clearly wrong. This they have failed to do.

In *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, the shipping line sought to have the Court require the Canal Co. adjust its rates to conform to the language of the treaty that the "charges for traffic shall be just and equitable," and therefore to require the Company to "fix new tolls." The Court said that within the provisions of what was "just and equitable" Congress left to the Company the fixing of tolls. In denying relief, the Court said it "must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision." [356 U.S. 318].

The Navy's present system of fixing pay of supervisors came into existence about 1952. It has been used for many years. To be sure Congress is aware of the use of such a system, since it approves the Navy's budget. While that "does not necessarily mean that the construction of the Statutes (Act) pressed on us and on Congress by defendant (petitioner)

is the correct one," it does "indicate that the question is so wide open and at large as to be left at this stage to Navy's (agency) discretion." *Panama Canal Co. v. Grace Line, Inc.*, supra.

How often surveys are to be conducted, the means of conducting them, the fixing of grades and classifications, and the fixing of a basis for supervisory pay is under the statute left to the discretion of the Navy, and now transferred to the Civil Service.

In order to prevail in this action, the plaintiffs have the "heavy burden of proving that the Navy's [Secretary's] action in this instance was so arbitrary as to be clearly wrong." *Daniels v. United States*, supra [407 F.2d 1347].

Plaintiffs' complaint that the pay of supervisors is not in keeping with that of the Newport News Ship is not supported by the record. First, it has been next to impossible for the defendants to obtain information from Newport News Ship, and the record here is far from complete in that regard. Secondly, it is difficult to pair the supervisors of the two installations as to duties, number of persons supervised, responsibilities, etc. The evidence in the record concerning these matters, and comparable pay scales, is lacking. About the only comparison which can be made is the number of persons supervised. But the defendants are not limited to meeting the standard of Newport News Ship. They have the duty to establish rates "as nearly as is consistent with the public interest" to conform "with those of private establishments in the immediate vicinity," and under the law prior to September 1966, and since that date "consistent with the public interest in accordance with prevailing rates." Hence, the pay rates must be (a) consistent with the public interest, and (b) conform with those of private establishments in the immediate vicinity, or, stated differently for use since September 1966, in accordance with prevailing rates. Just as one swallow does not make a summer, the rate of pay of one

industry does not necessarily fix the rate of "private establishments in the immediate vicinity," or the "prevailing rates." The labor market in the vicinity must be considered. Neither the highest nor the lowest rate of pay is to be accepted, but the prevailing rates, and then consistent with the public interest. The determination of that rate is for the defendants. The statute does not specify the means to be used to determine the pay scale, how frequent adjustments in rates must be made, or how data is to be collected. These are matters left to the discretion of the defendants.

What the defendants have determined is that the rate of pay for a tradesman or mechanic may and will vary from trade to trade and area to area, but a given level of supervision over that mechanic is worth a proportion more, and that the proportion should be the same throughout the Country. Defendants have determined that shound and efficient administration demands the use of such a consistent system throughout the Country, and between many facilities within a given wage area. Plausible arguments may be made against such a system, but the law vests this discretion in the defendants. This same system was before the Court in *Daniels v. United States*, supra. There the pay of civilian pilots was fixed by applying a formula of 70 per cent to the base pay of a Class A Ship's Master in the Military Sea Transportation Service. The statute under construction was in language similar to the statutes here. There, the Court said the defendants were vested "with great discretion in setting wages. It is his administrative responsibility to determine how closely the salaries of the specified personnel can parallel the maritime industry's rates and still be 'consistent with the public interest.' " Much of what was said in that opinion is peculiarly applicable here. It was said there:

> A showing of a regional salary difference without more is insufficient to prove that the Secretary's choice and use of the nationally applied salary rate

was arbitrary and inconsistent with his statutory duty.

To sum up, the evidence does not show defendants did not review and/or compile the wages of persons doing substantially the same work and with similar responsibilities of plaintiffs, or that the surveys were not taken in similar industries, or that the defendants set an arbitrary differential in pay of plaintiffs over the tradesmen they supervise. Nor does the evidence show that supervisory personnel was not used in making the wage survey. However, it should be pointed out that the Act does not specify or require that supervisory personnel be used in making any surveys.

As to the claim for overtime pay, plaintiffs seem to have abandoned this claim. Evidence was not presented on this claim, nor have plaintiffs raised the issue in their breifs. Defendants say that before plaintiffs could recover for overtime, written authorization is required, and that plaintiffs in their answers to interrogatories have admitted no written authorization was given. They cite *Post v. United States,* 121 Ct. Cls. 94, 99 (1951); *Bantom v. United States,* 165 Ct. Cls. 312 317-19 (1964), cert. denied 379 U.S. 890. The Court need not pass on this issue.

The plaintiffs' action is accordingly ORDERED DISMISSED.

s/ Richard B. Dillard

United States District Judge

Richmond, Virginia.

September 14, 1970.

APPENDIX "A"
CLASSIFICATIONS OF SUPERVISORS OVER BLUE–COLLAR WORKERS AT NORFOLK NAVAL SHIPYARD

TITLE	NUMBER SUPERVISED	GENERAL DUTIES	PERCENTAGE OF PAY DIFFERENTIAL
Leader	5 to 10 journeymen	Works with his men	12%
Foreman Leading-Man	12 to 28	Plan the mechanics' work schedule, instruct mechanics in their work, review quality of work, grant leave on ratings, etc.	25% increased July 1969 to 30%
General Foreman I	28 to 95	Will have 2 to 5 Foremen-Leadingmen working with him, with their groups.	40% increased to 45%
General Foreman II	100 to 200	Will have several General Foremen I (sometimes called Quartermen) working with him.	55% increased to 60%
Superintendent I	excess of 200	In charge of a small shop or may be assistant in charge of a large shop.	175%*
Superintendent II	400 +	Head of a shop	215%*
Group Superintendent	Several Thousand	Supervises a group of shops, each of which is headed by a Superintendent I or II, is a coordinator over this group.	227%*

* Based on National Average.

APPENDIX "B"
CLASSIFICATIONS OF SUPERVISORS OVER
BLUE-COLLAR WORKERS AT
NEWPORT NEWS SHIPBUILDING AND DRY
DOCK CORPORATION

TITLE	NUMBER SUPERVISED	GENERAL DUTIES	METHOD OF PAY
Quarterman	10 to 25	Directs activities of craftsmen.	Weekly salary
Assistant Foreman	5 to 12 Quartermen (50 to 300 men)		Monthly salary
Foreman	500 to 2000	A department head – in charge of entire operation. Considered one of the top management.	Monthly salary
Assistant Superintendent		In charge of a department or several departments.	
Superintendent	In charge of 5 Assistant Superintendents	In charge of a division – several departments.	

APPENDIX C

* * *

(Tr. p. 84) JOHN J. GAUGHAN,
a witness called by and in behalf of the plaintiffs, having been first duly sworn, testified as follows:

DIRECTION EXAMINATION

By Mr. Sacks:

Q. Will you tell us your name, please, sir?
A. John J. Gaughan.
Q. Maybe a little louder, if you will.
A. John J. Gaughan.
Q. How do you spell that, Mr. Gaughan?
A. G-a-u-g-h-a-n.
Q. And where do you live?
A. At 108 Archer Road in Newport News.
Q. And what is your employment, Mr. Gaughan?
A. In the Newport News Shipbuilding and Dry Dock Company.
Q. And how long have you been employed at Newport News?
A. Twenty-nine years. A little over.
Q. What did you start –
I'm not going to go into detail.
What did you start as over there at the shipyard?

(Tr. p. 85)

A. I started in the Personnel Department in the Employment.
Q. All right, sir.
And have you been in the Employment Department –
A. Yes.
Q. – in Newport News all the time you have been there?
A. Yes, sir; I have.

Q. What is your position with Newport News now?
A. Up until about three months ago it was Employment Manager. I am now Manager of Personnel Services.
Q. All right, sir.
How long were you Employment Manager?
How long?
A. Six years.
Q. And, very briefly, what duties were included and responsibilities as Employment Manager?
A. Employment Manager.
Q. Yes, sir.
What were your duties?
A. It's basically the employment procurement and transferring of personnel within the yard. However, we also were responsible for recording rates, approving rates, transferring of personnel, termination of personnel.

(Tr. p. 86)

Q. All right, sir.
When you say "approving rates" rates of what?
A. Rates of pay for the various categories; any rerating of the employee from one rate unto another one.
Q. All right, sir.
Well, rating and rerating – did it require experience with and knowledge of the pay at Newport News Shipbuilding?
A. Yes.
Q. All right, sir.
Now, Mr. Gaughan, how many people worked under you when you were Employment Manager? Roughly how many people in your –
A. From 50 to 60 –
Q. All right, sir.
A. – in the –
Q. And were their duties only employment –

A. Yes.
Q. — in the nature that you have described?
A. Yes. This is true.
Q. And over the years, Mr. Gaughan, have you then been required to be familiar with and knowledgeable about the various jobs to be filled and the jobs that are made up of workers at the Newport News Company?
A. Fairly knowledgeable; yes, sir.

(Tr. p. 87)

Q. Do you have a knowledge of the duties and responsibilities of the various employees and their different classifications at Newport News?
A. Generally so; yes.
Q. All right.
And do you have a knowledge of their pay and were you required to work with the official records of Newport News kept in the ordinary course of business regarding their pay?
A. Yes; I was.
Q. All right.
Now, Mr. Gaughan, did there come a time in the relatively recent past when you were requested to seek out certain pay information of Newport News Shipbuilding and Dry Dock Company employees doing supervisory work?
A. Was there a time when we were requested —
Q. Did anybody ask you recently, either for you or someone under you in your office, to obtain the pay data from men in supervisory work in the Newport News Shipbuilding and Dry Dock Company Yard?
A. Fairly recently; yes.
Q. All right.
A. In recent years.

Q. All right, sir.
Do you know where the request came from?

(Tr. p. 88)

A. Generally, Generally; yes.
Q. Where did it come from?
A. From a government wage survey group.
Q. All right.
Now, you are speaking of
Did the government come to your yard and seek out wage information over the years?
A. A representative came.
Q. All right.
A. Yes.
Q. To your knowledge, how long did that go on, roughly?
A. To my knowledge, two or three years.
Q. All right, sir.
Did you participate in the government wage surveys of Newport News Yard, or you did not?
A. We
To a certain extent, we did; yes; sir.
Q. All right, sir.
Do you know whether or not there was a pledge of confidentiality by the government to the Newport News Yard that they would not disclose what information they obtained in those surveys?
A. I understand there has been; yes, sir.
Q. All right, sir.

(Tr. p. 89):

Mr. Gaughan, I show you Plaintiffs' Exhibit 52, marked for identification, and ask you, please, sir –

MR. SACKS: Excuse me just one minute, if you will.

By Mr. Sacks:

Q. Mr. Gaughan, I show you Plaintiffs' Exhibit 52, three pages, and ask if you would look at those and tell me, first of all: Can you recognize the information that is contained in that exhibit?

A. Yes; I can.

Q. All right.
Now, Mr. Gaughan, the middle sheet of that exhibit happens to be a letter from a Mr. William Ferguson, does it not?

A. Yes; it is.

Q. Who is Mr. Ferguson?

A. Mr. Ferguson is an attorney, who is on a retainer.

Q. Represents the shipyard?

A. Represents Newport News Shipbuilding and Dry Dock Company; yes.

Q. All right.
Now, the first page, Mr. Gaughan –
What is the first page of that exhibit?

A. It's the rates of pay for Quartermen in the year 1952, '58 and 1966.

(Tr. p. 90)

Q. All right, sir.
Now, is that information that was taken from the official records of your company reflecting the wages that were paid Quartermen, Shipfitters' Department, by your yard?

A. Yes.

Q. There are various columns there, Mr. Gaughan. Would you explain the multiple columns?

A. Column 1 is a Shipfitter Quarterman who had worked for the company for one year; Column 2 for five years, and Column 3 for a 10-year period.

Q. All right, sir.
Now, the money figures, the wage that is reflected in the document what is that for? What period of time? Is that a weekly wage?

A. Yes. This is for 40 hours. A weekly wage; yes.
Q. That is what I want to know.
Is that the wage that was paid to the Quartermen for 40 hours' week work?
A. That's right.
Q. It's the basic salary paid?
A. That is right.
Q. All right, sir.

(Tr. p. 91)

Now, when you say Quarterman, Mr. Gaughan, in the Shipfitters' Department, what kind of work does he do?
A. A Quarterman is a supervisor who directs the activities of the craftsmen, –
Q. All right, sir.
A. – and he might have from 10 to 20 or 25 craftsmen that he's directing the activities.
Q. Now, when you say "craftsmen", I think it's apparent, but what do you mean?
The Quarterman supervising a craftsman – what do you mean by "a craftsman"?
A. An hourly production worker.
Q. And in the Shipfitter Department, of course, he would be a shipfitter?
A. That is right.
Q. Are there Quartermen who supervise craftsmen in other departments at the shipyard, Newport News Shipyard?
A. Yes, sir.
Q. Just two or three representative departments that that occurs in are what?
A. Welders'. Electricians'.
Q. All right, sir.
A. Machine Shop.
Q. Is the same description that you have given us of the Quartermen supervising that varying number of personnel or craftsmen – is that true in the

(Tr. p. 92)

other departments just as it is in Shipfitters'?

A. Yes; it is.

Q. So that the information given for shipfitters – is it representative of the wages paid to those supervisors or people in supervisory capacity in the other departments?

A. It would be a representative department; yes, sir.

Q. All right, sir.
Now, Mr. Gaughan, is the Quarterman the first level or not of supervisory employee above the mechanic or the tradesman?

A. He's the first line supervisor.

Q. All right, sir.
Now, Mr. Gaughan, I show you Plaintiffs' Exhibit 53, which has been described as government position description or job description of the Norfolk Naval Shipyard supervisors, and ask you: Have you ever seen that document or one like it before?

A. Yes; I have.

Q. Did you recently confer with Mr. Greenfield and Mr. Rogers and with me pertaining to that?

A. Yes; I did.

Q. Did you have an opportunity at that time to examine the position description of the Naval Yard worker?

(Tr. p. 93)

A. Yes; I did.

Q. And, Mr. Gaughan, based on your knowledge and experience with the duties and responsibilities of your Quarterman or your first line supervisor, is there a comparison between his duties and responsibilities and the duties and responsibilities of the former Leadingman or first line supervisor of the Norfolk Naval Shipyard?

A. Yes; there is a very – there is a very strong similarity.

Q. All right, sir.
They compare very strongly, do they not?

A. Yes.
Q. All right, sir.
Now, would you look at the last page?
Skip Mr. Ferguson's letter in the first document, that is, in Plaintiffs' Exhibit 52, and, looking at the last page, there are two sets of wage figures shown there, are there not?
A. Yes; there are.
Q. What is the top set?
A. The top set is the wage rates for Assistant Foreman.
Q. Assistant Foreman?
A. Yes.
Q. Employed —

(Tr. p. 94)

A. In the Shipfitters' Department.
Q. Employed at Newport News Shipbuilding and Dry Dock Company?
A. Yes.
Q. Is the same thing true, to identify it, Mr. Gaughan, that it came from your regular records and reflects the pay that was paid the Assistant Foremen in the shipyard in those respective representative years?
A. Yes, sir.
Q. How, what is an Assistant Foreman in the Newport News Yard?
A. Assistant Foreman is a level of supervisor over our Quartermen.
Q. All right.
A. Actually, the Quartermen report to the Assistant Foreman as the next level of supervision.
Q. And how many Quartermen or first line supervisors would you say generally would be under the Assistant Foreman and have to report to him?
A. From five to 10 or 12.
Q. All right, sir.
And are the same things true, without me going into detail, that the figures shown for Assistant Foreman on that exhibit, while pertaining to the Shipfitters' Department, are representative of Assistant Foremen in the other trade departments in your yard?

(Tr. p. 95)

A. Yes; it is.

Q. Now, Mr. Gaughan, again directing your attention to the position description or the job description of the Norfolk Naval Shipyard supervisor, is there a level of supervision in the Naval Shipyard that compares in any fashion to your Assistant Foreman?

A. Yes; there is.

Q. Now, would you examine the position description of the Navy with regard to comparing the duties and responsibilities of the two that is, your Assistant Foreman and their second line supervisor?

A. Yes; I did.

Q. What do you state today, in your judgment, based on your experience – .

A. I think they are comparable.

Q. They are comparable?

A. Yes.

Q. All right.

Now, Mr. Gaughan, do your second level or second line supervisors, that is, your Assistant Foremen – do they report in turn to a higher level?

A. Yes; they do.

Q. What's the next level of employment in your yard to which your Assistant Foremen report?

(Tr. p. 96)

A. To what we call a Department Head.

Q. I'm sorry.

A. A Department Head that is normally called a Foreman or he's a Department Head. He's in charge of the entire operation.

Q. You call him a Foreman?

A. A Foreman.

Q. Is that, in your judgment, or not a third level of supervision?

A. It is a third level of supervision.

Q. All right, sir.

Now, is there on the first exhibit – I think Plaintiffs' Exhibit 54 – excuse me – 52 – is there a

listing of the pay that is paid your Foremen, your third level of supervision, in these representative years?

A. There are rates here for this; yes.

Q. And is the same thing true, that is, it comes from Newport News books and it is representative of Foremen in the various departments even though this is only given for shipfitters?

A. Yes. This came from Newport News books.

Q. All right, sir.

MR. SACKS: If your Honor please, I would like to introduce this Exhibit 52, which has been described by Mr. Gaughan.

(Tr. p. 97)

THE COURT: All right, sir. It's admitted.

* * *

EXHIBIT 52

QUARTERMEN – SHIPFITTERS' DEPARTMENT
NEWPORT NEWS SHIPBUILDING AND DRY DOCK CO.
(40 hour week)

	1 Year	5 Years	10 Years
1952	104.80	104.80	104.80
1958	138.00	143.60	147.60
1966	168.00	186.00	198.00

EXHIBIT 54

LEVEL 10

1952	1st Step	2nd Step	3rd Step
LDGM Foreman	2.05	2.14	2.23
QURM Gen Foreman I	2.36	2.46	2.56
CHE. QTRM Gen Form II	2.67	2.78	2.89
1958			
LDGM Foreman	3.04	3.17	3.30
QTRM Gen Foreman I	3.50	3.65	3.80
CHE. QTRM Gen Foreman II	3.96	4.12	4.28
1966			
LDGM Foreman	3.71	3.86	4.01
QTRM Gen Foreman I	4.26	4.44	4.62
CHE QTRM Gen Form II	4.82	5.02	5.22
		6 Months	2 yrs.

Automotive Mechanic
Bridge Crane Operator
Caucker & Chipper (Iron)
Painter
Pneumatic Tool Operator, Shipstructures

LEVEL II

1952	1st Step	2nd Step	3rd Step
LDGM Foreman	3.26	2.35	2.44
DTRM Gen Foreman I	2.59	2.70	2.81
CHE. QTRM Gen Form II	2.94	3.06	3.18
1958			
LDGM Foreman	3.16	3.27	3.42
QTRM Gen Foreman I	3.62	3.78	3.93
CHE. QTRM Gen Foreman II	4.11	4.28	4.45
1966			
LDGM Foreman	3.85	4.01	4.17
QTRM Gen Foreman I	4.45	4.61	4.79
CHE QTRM Gen Form II	5.00	5.21	5.41
		6 Months	2 yrs.

Blacksmith
Boat Builder
Boiler Maker
Electrician
Joiner
Machinist
Pipe Coverer & Insulator
Pipefitter
Rigger
Sheetmetal Worker
Shipfitter
Shipweight
Welder

LEVEL 12

1952	1st Step	2nd Step	3rd Step
LDGM. Foreman	2.31	2.41	2.51
QTRM Gen Foreman I	2.66	2.77	2.88
CHF. QTRM Gen Form II	3.00	3.13	3.26
1958			
LDGM Foreman	3.22	3.35	3.43
QTRM Gen Foreman I	3.70	3.85	4.00
CHE. QTRM Gen Foreman II	4.19	4.36	4.55
1966			
LDGM Foreman	3.92	4.08	4.24
QTRM Gen Foreman I	4.50	4.69	4.88
CHE. QTRM Gen Form II	5.17	5.30	5.60
		6 Months	2 yrs.

Electronic Mechanic
Instrument Mechanic
Fire Control Mechanic

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No. 71-242

In the Supreme Court of the United States

OCTOBER TERM, 1971

HAROLD P. ROGERS, ET AL., PETITIONERS

v.

MELVIN R. LAIRD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a2) is not yet reported. The opinion of the district court (Pet. App. a3-a14) is reported at 319 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1971. The petition for a writ of certiorari was filed on August 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the lower courts erred in their factual determination that petitioners had failed to show that they were being paid at rates below the "prevailing rates" referred to in 5 U.S.C. 5341.

2. Whether the Secretary's determination to utilize a percentage differential system for computing the wages of Navy blue-collar supervisors was arbitrary or capricious.

STATUTE INVOLVED

5 U.S.C. 5341 provides in pertinent part:

> (a) The pay of employees excepted from chapter 51 of this title by section 5102(c)(7) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. * * *

STATEMENT

Petitioners are blue-collar supervisors employed at the Norfolk Naval Shipyard who brought this action contending that the use by the Secretary of the Navy of a "percentage differential" system in calculating their wages resulted in their receiving wages below the "prevailing rates" contemplated by 5 U.S.C. 5341 (Pet. App. a3–a4). The district court found that petitioners had failed to show that they were in fact receiving wages below prevailing rates, and upheld the percentage differential system as a reasonable exercise of the Secretary's discretion under the statute (Pet. App. a3–a14). The court of appeals affirmed *per curiam* on the district court's opinion (Pet. App. a1–a2).

1. The evidence before the district court showed that, in order to determine the prevailing rates on which blue collar wages are based, the Secretary regularly conducts wage surveys in each area where Navy personnel are employed.[1] Wage data are collected in each area from representative area companies that have similar jobs and working conditions to those of the Navy (Pet. App. a5). In the Norfolk area, the Navy has obtained wage data from more than 30 companies, including five private shipyards (Exhibit 61; Tr. 75, 80).[2] The wage survey information is the basis for wages paid at all the Naval activities in the Norfolk area (Pet. App. a5).

While the wages of blue-collar journeymen are based on a direct comparison with locally prevailing rates, the Navy has long computed the salaries of its blue-collar supervisors by using a differential system whereby the supervisor's pay is related to that of the worker he supervises (Sup. App. a23; Tr. 163). That differential may be expressed as either a flat "cents-per-hour" above the journeyman wage, or in a more flexible manner as a percentage of that wage. The differential method of computing blue-collar supervisory wages is the "prevalent system" used in private industry (Sup. App. a23; see Pet. App. a6).

[1] Full scale wage-surveys are conducted every three years. In the intervening years, a wage change survey is conducted, which considers only the changes in wages since the preceding year. Salaries are reviewed annually, and for the past twenty-five years, blue-collar salaries have regularly increased as a result of the surveys. (Pet. App. a5).

[2] References to the record before the court of appeals are to the Appendix (App.), Supplementary Appendix (Sup. App.), the Transcript (Tr.), or exhibits by number.

The Navy's use of a differential method in paying its blue-collar supervisors was not based solely upon the wide use of this system in private industry, but turned also on several other considerations. These included: (1) the fact that the government typically has a greater number of levels of supervision than does private industry, so that direct comparisons are difficult if not impossible at the supervisory level (Pet. App. a5; Sup. App. a15); (2) the fact that while comparable positions may exist in some areas, they do not exist in all, and a direct comparison method for supervisory salaries would therefore not produce a consistent and rational pay system (App. a85, a90); and (3) the fact that while mechanics' wages are available, private employers have consistently refused to make supervisory salary schedules available to the government (Pet. App. a6).

In 1952, following an exhaustive analysis of its own and private industry's supervisory pay practices, the Navy replaced its long-standing fixed cents per hour differential with a percentage differential (Pet. App. a4). The differential was set at 25 percent for the first level of supervision; higher supervisory levels received higher percentages. To establish that percentage, the Navy studied its past practices under the flat rate differential, which revealed that on a percentage basis, the supervisory differential had averaged between twenty and thirty percent (Sup. App. a24–a27). The Navy also conducted a study of private industry rates and found them in the same range (App. a99).

Subsequently, the differentials were restudied over the years, and compared to private industry rates (Sup. App. a15). For example, in 1964, the Navy conducted a survey of supervisory pay involving both initial and senior supervisory positions (Sup. App. a28–a33). This study revealed that the mean percentage over journeyman mechanics in private industry was 24.8 percent and for senior supervisors the industry differential was 208 percent compared to the Navy's 215 percent (Sup. App. a32–a33).

Since 1968, the Civil Service Commission has had the responsibility for establishing blue-collar wages for all government employees under 5 U.S.C. 5341. The Civil Service Commission has adopted a percentage differential system for paying all government blue-collar supervisors (Pet. App. a6–a7).

ARGUMENT

1. The lower courts correctly concluded that the percentage differential system, used by the Navy since 1952 and adopted throughout the government in 1968, is reasonable under 5 U.S.C. 5341. The decision to use a percentage differential was reached after extensive administrative scrutiny of the Navy's past practices and those of private industry, where this system is "widely used" (Pet. App. a6). In addition, the evidence revealed that substantial differences exist between the Navy and private industry in their organization, that comparable supervisory pay rates were largely unavailable, and that the percentage differential resulted in wages approximating prevailing rates in the area.

Congress' long acquiescence in the Navy's use of this differential also indicates its compatability with the statutory plan. See *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-473. Moreover, the decision below conflicts with no other lower court decision. The Navy's use of a percentage differential under virtually identical statutory language[5] was upheld in *Daniels* v. *United States*, 407 F. 2d 1345 (Ct. Cl.).

2. Petitioners argue (Pet. 9) that the district court erred in rejecting their contention that the pay of Navy supervisors in Norfolk was not in keeping with that of supervisors at a local shipyard (Pet. App. a10). The district court's decision on this question of fact—concurred in by the court of appeals—was correct and further review is unwarranted.

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[5] 5 U.S.C. 5342 provides that compensation for ships' pilots be fixed "as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry."

[6] The charts appended to the district court opinion (Pet. App. a13, a14) show that there is little correlation between the responsibilities of Navy supervisors and those at the private shipyard in Norfolk. Even assuming the responsibilities were similar, the wage data introduced (App. a16, a18, a38) revealed that at the first two supervisory levels, the mean difference between the Navy rate of pay and that at the private shipyard was $.19 per hour. The higher private rates were in part the result of the fact that the private salaries are earned after the supervisor has worked for a longer period of time, *e.g.*, one year rather than six months, or five years instead of two years.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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